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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 739

STUART E. HERTZBERG, Trustee,
Petitioner,
vs.
ASSOCIATES DISCOUNT CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above cause on December 1, 1959.

(A) OPINIONS BELOW

The following opinions were rendered in the within cause. Said opinions are attached hereto as Appendix A:

1. *Hertzberg v. Associates Discount Corporation,* (6 Cir. 1959) 272 F. 2d 6.
2. *In re Hyman Freedman,* (D.C. E.D. Mich. 1958) 168 F. Supp. 25.
3. Unreported opinion of the Referee in Bankruptcy.

(B) JURISDICTION

Jurisdiction is conferred on this Court by Section 24(c) of the Bankruptcy Act, 11 USC Sec. 47 (c); and by 28 USC, Sec. 1254.

(C) QUESTION PRESENTED FOR REVIEW

The following question is presented for review:

Does a State statute conflict with Sections 70(c) and 70(e) of the Bankruptcy Act when the statute provides that a belatedly recorded chattel mortgage is void as against simple interim creditors of the mortgagor, but is valid as against a Trustee in bankruptcy?

(D) STATUTES INVOLVED

1. The Constitution of the United States, Art. I, Sec. 8, cl. 4:

> "The Congress shall have Power . . . To establish . . . uniform laws on the subject of Bankruptcies throughout the United States."

2. The Constitution of the United States, Art. VI, Sec. 2:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

3. Bankruptcy Act, Sec. 70(c); 11 USC Sec. 110(c):

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

4. Bankruptcy Act, Sec. 70(e); 11 USC Sec. 110(e):

> "(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law is applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.
>
> "(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: Provided, however, That the

court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws.

"(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

5. Michigan Compiled Laws, 1948, Sec. 566.140, as amended by Public Acts of 1956, Act 153; M.S.A. Sec. 26.929:

"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county where the goods or chattels are located, and also where the mortgagor resides, except when the mortgagor is a non-resident of the state, when the mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county in which the property is located: *Provided, that any such mortgage shall not be void in the case of insolvency proceedings as against the creditors of the mortgagor*

*if filed within fourteen (14) days from the date thereof. * * *"*[1]

(E) STATEMENT OF THE CASE

This case involves the validity of a chattel mortgage on a Chevrolet truck owned by the bankrupt against the claim of the trustee in bankruptcy that the mortgage be declared null and void.

The bankrupt filed a voluntary petition in bankruptcy on January 2, 1958, and was adjudicated on that day. Previously, on June 26, 1957, the bankrupt had purchased the Chevrolet truck and executed a chattel mortgage thereon, which was recorded in the office of the Wayne County Register of Deeds on July 5, 1957, nine days after execution. The bankrupt had possession of the truck from the purchase date until the mortgagee's assignee, Associates Discount Corporation, repossessed it, either shortly before, or shortly after, the date of bankruptcy.

The receiver, who is the present trustee, petitioned the referee for an order to show cause why the mortgage lien of Associates Discount Corporation should not be declared null and void under Sec. 70(c) of the Bankruptcy Act, Sec., 110 (c), Title 11, U. S. Code. Associates Discount Corporation contended that its lien was valid under Act 153 Mich. Public Acts 1956, Sec. 26.929 M.S.A. The referee declared the lien null and void. On review, the District Judge reversed the ruling of the referee and held the lien valid.

NOTE 1. The last proviso was added by Act 153 of 1956, and it is this proviso which petitioner claims is in conflict with the Bankruptcy Act.

The trustee, petitioner herein, appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the decision of the District Court on December 1, 1959.

REASONS FOR GRANTING THE WRIT

1. To Define Federal-State Relation in Bankruptcy Matters.

This case presents a problem of the Federal-State relationship in the field of bankruptcy. Although this Court, on several occasions, has discussed the Federal-State relationship, it has not decided the precise question presented by this case. And, if the answer to this question as given by the Court of Appeals is left standing, the Constitutional supremacy and uniformity of the Bankruptcy Act is capable of being destroyed by the acts of fifty separate State Legislatures.

Petitioner believes that there is a basic and irreconcilable conflict between the proviso added by Act 153 of 1956 (Michigan) and Sections 70c and 70e of the Bankruptcy Act. Although the Court of Appeals and the District Court apparently saw the existence of the conflict, both courts resolved it in favor of the state law. The conflict may be demonstrated as follows:

1. Under Michigan law, the mortgage in this case was void as against any creditor of the mortgagor who extended credit between June 26, 1957 and July 5, 1957. The rights acquired by such a creditor could not have been subsequently lost, and would even prevail over the rights of a purchaser at a foreclosure sale, C.L. '48, Sec. 566.140, MSA 26.929; *Ransom & Randolph v.*

Moore, (1935) 272 Mich. 31; *Timmer v. Talbot*, (WD, Mich., 1936) 19 F. Supp. 687.

2. Under Sec. 70e of the Bankruptcy Act, the trustee would be vested with the rights of such a creditor, if one actually existed. *GMAC v. Coller*, (6 Cir., 1939) 106 F. 2d 584, cert. den. (1940) 309 US 692.

3. Under Sec. 70c of the Bankruptcy Act, the trustee is vested with such rights, whether or not such a creditor actually exists, *Constance v. Harvey*, (2 Cir. 1954) 215 F. 2d 571; cert. den. (1955) 348 US 913; *Conti v. Volper* (2 Cir. 1956) 229 F. 2d 317.

4. Act 153 of 1956, by allowing a mortgagee 14 days to record only if his mortgage is attacked in insolvency proceedings, deprives the trustee of the rights granted him by Sec. 70c and 70e of the Bankruptcy Act.

The decision of the Court of Appeals means that a State can condition the validity of a security instrument upon the filing of a petition in bankruptcy. It means that a State can give its creditors remedies in the local courts, but can deny these same remedies to a trustee, despite the clear language to the contrary contained in Sec. 70 of the Bankruptcy Act. It means that a State can say that the filing of a petition in bankruptcy validates liens which are otherwise invalid. It might even mean that a State could, first, allow property having a value of $1000 to be exempt from execution in its own courts; and, second, provide that "in the case of insolvency proceedings" the debtor would have a $2000 exemption.

There is no question of the supremacy of the Bankruptcy Act when it conflicts with State law. *International Shoe Co. v. Pinous* (1928) 278 US 261; *Local Loan Co. v. Hunt* (1934) 292 US 234. The power of Congress in bankruptcy

is a constitutional power, and is exclusive and paramount. Constitution, Art. 1, Sec. 8, cl. 4; Art. VI, Sec. 2.

We believe that this supremacy is seriously weakened by the decision of the Court of Appeals. A decision by this Court is necessary to define the extent of State power to use the filing of a petition in bankruptcy as an event which modifies debtor-creditor relationships.

2. To Define the Powers of a Trustee in Bankruptcy.

The Court of Appeals rested its decision upon the ground that the trustee takes over the bankrupt's property subject to pre-existing "rights established by local state law." This proposition sounds attractive, but it was rejected by this Court almost thirty years ago in *Moore v. Bay* (1931) 284 US 4. The trustee is a creature of Federal law, and his rights are created and defined by Federal law.

Although Secs. 70c and 70e speak of the rights of creditors under State law, the trustee does not simply inherit those rights, subject to the disabilities and infirmities of the creditors. The trustee is granted these rights by Congressional definition. As Zeus created Athena, so did Congress ordain that a trustee is born full-panoplied: armed with the rights which State law gives its most favored class of creditors, but deriving those rights from Congress and not from any actual creditor. *In re Krans Candy Co.* (7 Cir., 1954) 214 F. 2d 588, 592; *In re Consorto Construction Co., Inc.* (3 Cir., 1954) 212 F. 2d 676, 678; *Miller v. Sulmeyer* (9 Cir., 1959) 263 F. 2d 513, cert. den. (1959) 4 L. Ed. 2d 78. And even where the exercise of those rights is conditioned, as in Sec. 70e, upon the trustee's ability to find an actual creditor having a right, the discovery of such a creditor, even an unpaid milkman,[2] is merely the fulfill-

[2] *In re Tobias* (W. D. Mich., 1957), 150 F. Supp. 288.

ment of a condition precedent. The condition having been fulfilled, the creditor's rights end and the trustee's rights begin. And the trustee's rights are considerably greater than those of the creditor. *Moore v. Bay, supra; Miller v. Sulmeyer, supra.*

The Court of Appeals failed to give effect to the Congressional definitions of the trustee's powers. We feel that a decision by this Court is necessary to establish, definitely and finally, that the powers of a trustee are not derivative, that his powers do not arise by subrogation, that he doesn't stand in the shoes of the bankrupt's creditors; but that his rights are independent rights created by the Bankruptcy Act.

CONCLUSION

Petitioner prays that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

EXTRACT FROM OPINION OF HON. HARRY G. HACKETT, REFEREE IN BANKRUPTCY

As stated in our Findings of Fact, respondent's mortgage remained off record nine days—five days less than the time permitted by Public Act 153 which provides that in "case of insolvency proceedings" the mortgage shall not be void if filed within 14 days. Thus it is apparent that Public Act 153 affords respondent protection since bankruptcy proceedings are insolvency proceedings, *In Re Perry*, 157 F. Supp. 910,[4] unless it conflicts with Section 70 (c), which is the paramount law and binding on the Bankruptcy Court, *International Ladies' Garment Workers' Union v. Jay-Ann Company*, 228 F. 2d 632, or is unconstitutional.

In order to decide if there is a conflict between the state and federal statute now before us, we deem it necessary to review the law of Michigan relating to the recording of chattel morgages before enactment of Public Act 153.

Since May 16, 1847, the Michigan statute has held chattel mortgages not accompanied by an immediate and continued transfer of the goods mortgaged void as against subsequent good faith creditors, without notice, unless a copy thereof has been recorded in the Register of Deeds Office in the county where the mortgagor resides and where the mortgaged property is located.[5] The cases interpreting the statute have all held that persons who extend credit to mortgagors, without notice of an outstanding mortgage,

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[4] Neither the constitutionality of Public Act 153 nor its alleged conflict with Section 70 (c) were presented to Judge Starr as issues to be decided. For that reason the case is not a precedent for determination of these issues.

[5] See History of Public Act 153, Volume 19 of Michigan Statutes Annotated, P. 600-601.

while the same is not of record, become vested with rights superior to those of the mortgagee,—rights which cannot be defeated by the subsequent filing of the mortgage or by the mortgagor's subsequent taking possession. See *Ranson & Randolph Co. v. Moore*, 272 Michigan 31; *Fearey v. Cummings*, 41 Michigan 376; *O'Neil v. Brooks*, 180 Michigan 540. See also *General Motors Acceptance Corporation v. Coller*, CA 6, 106 F. 2d 584; *In Re Cotter*, 113 F. Supp. 859; and *In Re Plymouth Glass Co.*; United States District Court Eastern District of Michigan Southern Division, No. 38063.

Did Public Act 153 change Michigan's law? Reference to the language of that Act discloses that it did not dispense with the necessity of an immediate transfer of the mortgaged property or the alternative immediate recording, if the rights of subsequent good faith creditors without notice, are to be defeated. But in the event insolvency proceedings intervened, Public Act 1953 provides that mortgages recorded within 14 days after execution are valid against all. In other words Act 153, in case of bankruptcy, imputes validity to mortgages, void under other circumstances. Can state legislatures vest creditors with rights and provide that in case of bankruptcy they shall be automatically divested and thereby prevent the transfer of those rights to the trustee? We think not.

Section 70(c) of the Bankruptcy Act has provided that trustees as to all property of the bankrupt, upon which a creditor could have obtained a lien at the date of bankruptcy, shall be vested at the date of bankruptcy, with all the rights, remedies, and powers of a creditor holding a lien, whether or not such a creditor exists. The plain language of this section transfers the rights of creditors who could have obtained liens on the bankrupt's property, at the date of bankruptcy, to the trustee, at the date of bankruptcy. The instant the petition is filed, the rights of the creditor and the rights of the trustee simultaneously end and begin. There is no moment of lost time during which

a state legislature, if it had the power to do so,* could ordain the death of rights previously conferred on creditors, before Section 70(c) clothes the trustee with the same rights. Any attempt to accomplish this is a nullity in view of the provisions of Section 70(c) of the Bankruptcy Act, and must be held for naught in this Court.

Holding as we do that Public Act 153 affords respondent no defense against the trustee's action, we are remitted to the law of Michigan as it stood prior to passage of that Act. And if upon applying that law to the facts of this case we find that a creditor of the bankrupt could have obtained a lien upon the property in question at the date of bankruptcy, we must hold for the trustee. The fact that no such creditor exists or that no creditor did obtain a lien is of no consequence. See *Constance v. Harvey*, 215 F. 2d 571; Cert. denied 348 U. S. 913; *Conti v. Volper*, 229 F. 2d 317; *In Re Plymouth Glass Co., supra.*

Respondent's mortgage remained unfiled for nine days and the mortgagor retained possession. Under Michigan law, *Ranson & Randolph v. Moore, supra*, (See also *General Motors Acceptance Corporation v. Coller, supra*, and the cases cited on P. 2(a) herein) a creditor who extended credit during this period would have become vested with rights that would have forever remained superior to those of respondent, despite subsequent filing of the mortgage or the taking possession of the mortgaged property. Thus it would have been possible for such a creditor to have obtained a lien at the date of bankruptcy. Since Section 70(c) vests the trustee with the rights, powers and remedies of such a creditor, notwithstanding the fact that no such creditor exists, *Constance v. Harvey, supra*, the trustee must prevail.

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* See *Lockhart v. Garden City Bank and Trust Co.*, 116 F. 2d 658 at P. 662 where it was said what rights conferred on creditors by state law are transferred to the bankruptcy trustee is and must be left to the Bankruptcy Act. The case cites *Moore v. Bay*, 284 U. S. 4 as authority. Thus it would appear that once the legislature has conferred rights on creditors it had no authority to say that they shall cease in case of bankruptcy.

Lest our remarks herein be misconstrued, we make it clear that we have not, up to this time, expressed any opinion upon the constitutionality or unconstitutionality of Public Act 153. We deem comment in this regard unnecessary in view of our holding that the statute conflicts with Section 70(c) of the Bankruptcy Act. But in passing we remark that Michigan law has established certain procedures that we think fall within Chief Judge Starr's definition of "insolvency proceedings" in *In Re Perry, supra.* No doubt all concede that Michigan's legislature has every right to say that it will give to other creditors certain rights, yet deprive trustees of those same rights for the benefit of all creditors in state insolvency proceedings insofar as this Court is concerned. In view of the foregoing, we think it would be unwise to smear that Act with the taint of unconstitutionality. To do so we feel, would be out of harmony with the principle enunciated by the highest Court of the land in *United States v. O. I. O.*, 335 U. S. 106, which held that courts should refrain from all avoidable constitutional pronouncement.

In view of the foregoing, it is ordered that the lien of respondent be, and the same is hereby declared null and void as against the Receiver.

It is further ordered that respondent forthwith turn over to the Receiver the Chevrolet truck in question or the proceeds therefrom.

Dated at Detroit, Michigan, this 23d day of April, 1958.

/s/ Harry G. Hackett,
Referee in Bankruptcy.

OPINION OF HON. RALPH M. FREEMAN, DISTRICT JUDGE

This proceeding is an appeal from an order of the referee in bankruptcy declaring null and void a lien of Associates Discount Corporation on a Chevrolet truck owned by the bankrupt.

The facts of the case are undisputed. Hymen Freedman filed a voluntary petition in bankruptcy on January 2, 1958, and was adjudicated a bankrupt on that day. On June 26, 1957, the bankrupt had purchased a Chevrolet truck and executed a chattel mortgage thereon to the assignor of Associates Discount. This chattel mortgage was recorded in the office of the Wayne County Register of Deeds on July 5, 1957, nine days after execution. The bankrupt appears to have had possession of the truck from the purchase date until Associates Discount repossessed it, either shortly before, or shortly after, the date of bankruptcy.

After January 2, 1958, the receiver (now trustee) petitioned the referee for an order to Associates Discount to show cause why its lien should not be declared null and void under Sec. 70(c) of the Bankruptcy Act, 11 U.S.C., Sec. 110(c). At a hearing on the order to show cause, Associates Discount raised as a defense Act 153, Mich. Public Acts, 1956; C.L. 1948, Sec. 566.140; Sec. 26.929, M.S.A. The parties filed briefs and the referee then rendered the opinion and order from which the instant appeal is taken, declaring Associates Discount's lien null and void.

This appeal is taken to review the decision of the referee on the issue of the application of Sec. 70(c) of the Bankruptcy Act to the facts of this case and on the issue of whether Act 153 of the 1956 Public Acts of Michigan may be used as a defense to the trustee's attempt to avoid Associates Discount's lien.

Sec. 70(c) provides, in pertinent part:

> "• • • The trustee, as to all property, whether or not coming into possession or control of the court, upon

which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

Act 153 provides, in pertinent part:

"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county where the goods or chattels are located, and also where the mortgagor resides, except when the mortgagor is a non-resident of the state, when the mortgage or a true copy thereof shall be filed in the office of the register of deeds of the county in which the property is located: Provided, however, that any such mortgage shall not be void in the case of insolvency proceedings as against the creditors of the mortgagor if filed within 14 days from the date thereof; * * *."

In the proceedings before the referee, and in the oral arguments and briefs filed before this court, the trustee argues that Sec. 70(c) gives him the power to avoid this lien, since a trustee is clothed with all the powers of "a perfect hypothetical lien creditor," cf. *Constance v. Harvey*, CA 2, 215 F. (2d) 571 (1954); cert. den. 348 U.S. 913, and, therefore, has all the rights of a pre-existing creditor who did extend credit during the nine days this chattel mortgage was not of record. Hence, the trustee contends that the mortgage is void as to interim creditors since it was not immediately recorded as required by Michigan law. Associates Discount argues that Act 153 is applicable to this

proceeding and gives the lienor fourteen days to record before any interim creditor may avoid a lien in insolvency proceedings. In reply, the trustee contends that Act 153 is in conflict with Sec. 70(c), Bankruptcy Act, and thus is not applicable to bankruptcy proceedings.

In his opinion, the referee held that Sec. 70(c) gave the trustee the power to avoid the lien held by Associates Discount, on the authority of *Constance v. Harvey, supra.* He then held that Act 153 was in conflict with the Bankruptcy Act, since Sec. 70(c) gave the trustee all the powers of the most perfect possible hypothetical creditor under state law, and the state could not withdraw from the trustee in bankruptcy, powers granted creditors under state law by the technique employed in that Act. He reasoned that there was no point in time when Act 153 could operate to strip the trustee of these powers; and, if the Michigan legislature intended the Act to apply to bankruptcy proceedings, as it did, cf. *In re Perry,* USDC WD Mich. SD, 157 F. Supp. 910 (1958), then it must be in conflict with the Bankruptcy Act. For these reasons, the referee declared Associates Discount's lien null and void.

Prior to the enactment of Act 153, Michigan law required immediate recording of chattel mortgages; and if a chattel mortgage were not recorded "immediately," it would be void as to any general creditors extending credit between the date of execution and the ultimate date of recordation. *Ransom and Randolph Co. v. Moore,* 272 Mich. 31 (1935); *O'Neil v. Brooks,* 180 Mich. 540 (1914); *Fearey v. Cummings,* 41 Mich. 376 (1879). Act 153 leaves the previous immediate recording requirement in full force and effect, except in the case of insolvency proceedings. However, the amending proviso of Act 153 clearly dictates that, if a lien is attacked by an interim creditor in state insolvency proceedings, the lien may not be avoided by any creditor if it were recorded within fourteen days from the date of execution.

Since the term "insolvency proceedings" has been correctly held to include, within its meaning, federal bankruptcy proceedings, *In re Perry, supra,* it is clear to the

court that Act 153 would validate this lien and insulate it from attack by any actual interim creditor in this proceeding, unless it is in conflict with the Bankruptcy Act.

In *Constance v. Harvey, supra*, the court considered a case where a chattel mortgage had not been recorded within a reasonable time, but had been recorded prior to the date of bankruptcy. Under New York law, a general creditor who extended credit, during the time a mortgage was thus "off record," could avoid the effect of the mortgage even though it was subsequently recorded before the creditor obtained an actual lien. Even though there was no proof of the existence of any actual interim creditor, the court held that the trustee had all the powers of a "perfect hypothetical lien creditor" and, therefore, had the powers of a general interim creditor who had extended credit prior to the date of bankruptcy and could thus avoid the chattel mortgagor's lien. This decision was based on the powers extended the trustee by Sec. 70(c). Applied to the facts at bar, this rule would allow the trustee to avoid Associates Discount's lien, but for the effect of Act 153.

Associates Discount has asked this court to refuse to apply the decision in *Constance v. Harvey, supra*, or to hold that Act 153 is not in conflict with the Bankruptcy Act. It is apparent that, if this court were to hold that Act 153 is in conflict with the Bankruptcy Act, it would then be necessary for the court to rule on the application of the rule in *Constance v. Harvey*. It is also apparent that the only way the court can reach the issue of whether Act 153 is in conflict with the Bankruptcy Act is to assume that the trustee has the power to avoid this lien if the fourteen day recording proviso is not applicable. In this case, such a power could be found only by applying the rule in *Constance v. Harvey*. However, if the court should rule that Act 153 is not in conflict with the Bankruptcy Act, any decision on the applicability of *Constance v. Harvey* would then become moot. Therefore, in its discussion of the issue involving Act 153, the court assumes, but does not decide, that the decision in *Constance v. Harvey* constitutes good law and gives the trustee the authority to avoid this lien if the fourteen day proviso in Act 153 is not operative.

In the opinion of this court, the referee was in error in holding that Act 153 is in conflict with the Bankruptcy Act.

It is well established that the powers of the trustee in bankruptcy are derived solely from the laws passed by Congress and that these laws will be held superior to any conflicting state laws. *Const.*, Art. I, Sec. 8, Clause 4; *Const.*, Art. VI, Sec. 2; *International Shoe Co. v. Pincus*, 278 U.S. 261 (1929). In the case at bar it is asserted that Congress has given the trustee the power to avoid this lien in Sec. 70(c), Bankruptcy Act. In that section, Congress has given the trustee all "the rights, remedies and powers" of a creditor holding a lien on property of the bankrupt, as of the date of bankruptcy, whether or not such a creditor actually exists. *Constance v. Harvey, supra*, holds that this section extends to the trustee the rights of a creditor under state law who extended credit prior to the date of bankruptcy, and, thus, he has the right to a superior lien on the property as of the date of bankruptcy, because of that prior extension of credit. Sec. 70(c) grants to the trustee all the powers of the most perfect class of creditors who could exist, whether or not they actually exist. That section does not attempt to define or limit this class of creditors. This determination is left entirely to state law. *Matter of Floyd-Scott Co.*, D.C. Mass., 224 Fed. 987 (1915); aff'd 228 F. 506. *In re Wright Industries*, DC ED Ohio, 93 F. Supp. 58 (1950). Thus, Congress has left the precise definition of the limits of the trustee's powers to be ascertained from the rights accruing to creditors under state law.

In Michigan, a general creditor who extends credit during the period after a chattel mortgage is executed but before it is recorded as required by the statutory "immediate" recording requirement, may avoid entirely the lien of such a chattel mortgage, and may gain a superior lien by legal process subsequent to the recording of such a mortgage. *Ransom and Randolph Co. v. Moore, supra; O'Neil v. Brooks, supra; Fearey v. Cummings, supra.* Thus, immediately prior to the filing of the petition in bankruptcy in this proceeding, a general interim creditor could have avoided the lien of Associates Discount, since this mort-

gage was not recorded "immediately." However, Act 153 provides that, in the case of any insolvency proceeding, a mortgage may not be avoided unless it was not filed within fourteen days of execution. This provision has been held to apply to federal bankruptcy proceedings. *In re Perry, supra.*

The referee held that Act 153 is in conflict with Sec. 70(c). In his opinion, he stated that Sec. 70(c) gave the trustee all the powers of a creditor under state law. He then reasoned that the powers of a hypothetical creditor ended and the powers of a trustee in bankruptcy began simultaneously, and that there was no point in time during which Act 153 could intervene and strip the trustee of his powers, as determined by his status as a creditor, under state law. He cited as authority for this proposition *Lockhart v. Garden City Bank and Trust Co.*, CA 2, 116 F. (2d) 658 (1941). This case stands for the rule that the powers of the trustee and the rights and remedies of creditors are determined as of the date of bankruptcy and remain fixed thereafter, regardless of state law. Applying this rule, the court held that a creditor's lien, good against the trustee at the date of bankruptcy, was not rendered invalid by the creditor's failure to refile the mortgage from which his lien was derived, within one year as required by state law to maintain a valid lien. The court said that the Bankruptcy Act determines what rights conferred on creditors by state law are transferred to the trustee. It held that only those rights available to creditors as of the date of bankruptcy are transferred to the trustee by Sec. 70(c). Applying the *Lockhart* case to the facts of the case at bar leads only to the conclusion that this court must look at the rights of state creditors as of the date of bankruptcy, and not thereafter, to determine the powers of the trustee.

The reasoning of the referee is ingenious; however, it does not seem to this court to be correct. The problem here is one of ascertaining the intent of Congress in promulgating Sec. 70(c). As stated above, the cases have uniformly held that the powers of the trustee as a hypothetical creditor are to be determined by reference to state law. *Matter of Floyd-Scott Co., supra; In re Wright Industries,*

supra. From these cases, the court must conclude that Congress intended that the powers it granted to the trustee under Sec. 70(c) be determined by reference to state law and did not intend any limitation on the extent to which state law might curtail these powers. If this court were to affirm the order of the referee, it would necessarily be holding, as the referee necessarily held, that Congress did not intend to allow a state to pass legislation affecting the rights of lien holders in insolvency proceedings, insofar as such legislation may affect the trustee's powers under Sec. 70(c) in federal bankruptcy proceedings. It seems to the court that such a holding imputes too much to the intent of Congress, and would be a departure from the line of cases holding that Congress intended only to grant to the trustee the rights and remedies of creditors as of the date of bankruptcy as determined by reference to the law of the appropriate state. As previously explained, Act 153 dictates that general interim creditors may not avoid, in insolvency proceedings, a chattel mortgage filed within fourteen days of its date of execution, as was the mortgage in this case. This Act does not strip the trustee of any powers, as the referee stated. The trustee never acquired the power to invalidate the lien of Associates Discount. Under Act 153, applicable state law in this case, a lien creditor has fourteen days to record his lien if the debtor becomes insolvent. An interim creditor acquires rights subject to such contingency, which, of course, is a continuous limitation on the interim creditor's rights. The fourteen day recording period takes effect as of the date of bankruptcy, and not thereafter. Concededly, it does not have any actual effect prior to the date of bankruptcy, but neither are the trustee's powers determined prior to that date. It would be appropriate to observe that Act 153 affects not only the rights of the trustee in bankruptcy, but also is operative on the rights of all interim creditors in Michigan who seek to avoid a lien during the course of any kind of state insolvency proceedings. Therefore, it cannot be said that Act 153 is solely directed at the trustee in bankruptcy, as the trustee in this proceeding contends. It affects the rights of creditors and, in so doing, it has an incidental effect on

the powers of the trustee. Sec. 70(c) clearly expresses the intent of Congress that the trustee have no more rights or remedies than a creditor who could have obtained a lien superior to Associates Discount's as of the date of bankruptcy and, therefore, the trustee cannot do so.

For the above reasons, the court determines that Act 153 does not conflict with Sec. 70(c) of the Bankruptcy Act.

The referee's opinion and order are in error and must be vacated. An appropriate order may be presented.

Ralph M. Freeman,
District Judge.

November 28, 1958.

OPINION OF COURT OF APPEALS FOR THE SIXTH CIRCUIT

Decided December 1, 1959.

Before: Miller, Cecil and Weick, Circuit Judges.

Miller, Circuit Judge. This case involves the validity of a chattel mortgage on a Chevrolet truck owned by the bankrupt against the claim of the trustee in bankruptcy that the mortgage be declared null and void.

The bankrupt filed a voluntary petition in bankruptcy on January 2, 1958, and was adjudicated on that day. Previously, on June 26, 1957, the bankrupt had purchased the Chevrolet truck and executed a chattel mortgage thereon, which was recorded in the office of the Wayne County Register of Deeds on July 5, 1957, nine days after execution. The bankrupt had possession of the truck from the purchase date until the mortgagee's assignee, Associates Discount Corporation, repossessed it, either shortly before, or shortly after, the date of bankruptcy.

The receiver, who is the present trustee, petitioned the referee for an order to show cause why the mortgage lien of Associates Discount Corporation should not be declared

null and void under Sec. 70 (c) of the Bankruptcy Act, Sec. 110 (c), Title 11, U. S. Code. Associates Discount Corporation contended that its lien was valid under Act 153 Mich. Public Acts 1956, Sec. 26.929, M. S. A. The referee declared the lien null and void. On review, the District Judge reversed the ruling of the referee and held the lien valid, from which ruling this appeal was taken.

Sec. 70 (c) of the Bankruptcy Act provides in part, as follows: "* * * The Trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

Michigan Act 153 provides that a chattel mortgage of the kind involved in this action shall be void as against the creditors of the mortgagor, unless the mortgage shall be recorded as therein provided, "Provided, however, That any such mortgage shall not be void in the case of insolvency proceedings as against the creditors of the mortgagor if filed within 14 days from the date thereof; * * *."

The trustee argues that Sec. 70 (c) gives him the power to avoid this lien since, under its provisions, a trustee is clothed with all the powers of "a perfect hypothetical lien creditor." *Sec. 70.47, Vol. 4, Collier on Bankruptcy, 14th Edition; Constance v. Harvey*, 215 F. (2) 571, C. A. 2nd, cert. denied, 348 U. S. 913. The trustee therefore has all the rights of a pre-existing creditor who extended credit during the nine days the chattel morgage was not of record. Associates Discount Corporation argues that Act 153 is applicable to this proceeding and gives the lienor 14 days to record the mortgage before any interim creditor could avoid the lien in insolvency proceedings. In reply, the trustee contends that Act 153 is in conflict with Sec. 70 (c), Bankruptcy Act, and thus is not applicable to bankruptcy proceedings.

The opinion of the District Judge, reported at *In re Freedman*, 168 F. Supp. 25, E. D. Mich., carefully analyzes and discusses these contentions. It was his conclusion that the powers of the trustee as a hypothetical creditor are to be determined by reference to state law, that in the enactment of Sec. 70 (c) Congress did not intend any limitation on the extent to which state law might curtail these powers, and that Act 153 did not strip the trustee of any powers, since the trustee had never acquired the power to invalidate the lien. This ruling is in accord with the settled law that the effect to be given in bankruptcy to an unrecorded chattel morgage is determined by the recording law of the state, *Holt v. Crucible Steel Co.*, 224 U. S. 262, 265; *Trailmobile, Inc. v. Wiesman, Trustee*, 244 F. (2) 76, C. A. 6th; *In re Glassman*, 262 F. (2) 857, C. A. 6th, and that when the bankruptcy court takes over the bankrupt's property, such property is taken subject to pre-existing rights established by the local state law. *In re Barlum Reatly Co.*, 154 F. (2) 562, 565, C A. 6th; *In re Sachs*, 30 F. (2) 510, 515, C. A. 4th. See also: *In re Prather*, 138 F. Supp. 433, S. D. Ill.; *Sec. 70.49, Vol. 4, Collier on Bankruptcy, 14th Edition.*

We concur in the conclusion of the District Judge for the reasons stated at length in said opinion, which need not be repeated here.

The judgment is affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 739

STUART E. HERTZBERG, Trustee,
Petitioner,

vs.

ASSOCIATES DISCOUNT CORPORATION,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent prays that the Petition for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above cause on December 1, 1959 be denied.

JURISDICTION

The Petitioner has failed to invoke, properly, the jurisdiction of this Court to review the issues presented by reason of the failure of the Petitioner to set forth in its Petition for Writ of Certiorari the date of the Judgment sought to be reviewed and the time of its entry, all as required by Rule 23 (b) (i) of the Supreme Court Rules.

Furthermore the Petition for Certiorari should be denied by reason of the fact that Rule 19 of the Supreme Court Rules provides that a review on a Writ of Certiorari will be granted only where there are special and important reasons therefor. The Michigan Statute in this case, namely Michigan Compiled Laws, 1948, Sec. 566.140, as amended by Public Laws of 1956, Act 153; M.S.A. Sec. 26.929, was superseded effective September 27, 1957 by Public Law of 1957, Act 233, to allow 14 days to file *purchase money* chattel mortgages and has been again amended by Public Laws of 1959, Act 110, effective March 19, 1960, to allow 10 days within which to file *all* chattel mortgages. Therefore the alleged conflict between the Bankruptcy Act and the Michigan Statute relied upon by the Petitioner, which conflict the Respondent denies ever existed, was dissolved by the Act of the Legislature of the State of Michigan effective September 27, 1957, and the statute involved in this case was in fact only in existence from August 11, 1956 to September 27, 1957. Inasmuch as legislation has been enacted which corrects what the Petitioner claims to have been a conflict between the Bankruptcy Act and the Michigan Statute, the question raised by the Petitioner has become academic and while it may present an intellectually interesting problem, this Court does not sit to satisfy a scholarly interest in such issues nor does it sit for the benefit

of the particular litigants. Rice v. Sioux City Memorial Park Cemetery (1955), 349 U. S. 70, 75 S. Ct. 614; Magnum Import Co. v. Coty, (1923), 262 U. S. 159, 163, 43. S. Ct. 531, 532.

QUESTION PRESENTED FOR REVIEW

The question presented for review by the Petitioner is not raised by the record in this case. The Petitioner's statement of the question makes reference to Section 70 (e) of the Bankruptcy Act but neither the opinion of the District Court nor the Court of Appeals construed or applied this Section to the case.

The question presented for review by the Petitioner is distorted in that it fails to make clear that the Michigan Statute involved herein applies in all insolvency proceedings and not only in Bankruptcy proceedings, In re Perry (W.D. Mich. 1958), 157 F. Supp. 910, and in all such insolvency proceedings applies to *all* creditors.

REASONS FOR DENYING THE WRIT

For the reasons hereinbefore more fully stated, the Petition for a Writ of Certiorari should be denied because it fails, as required by the Rules of the Supreme Court, to set forth the date and time of entry of the judgment sought to be reviewed; fails to set forth special and important reasons for granting such Writ; and fails to present a question for review.

It is the contention of the Respondent that there is no conflict whatsoever between Section 70 (c) of the Bankruptcy Act and Act 153 of 1956 Michigan. The chattel mortgage of the Respondent was filed in the Office of the Wayne County Register of Deeds, the correct place of filing, on July 5, 1957. The Bankrupt filed a voluntary

Petition in Bankruptcy on January 2, 1958. Section 70 (c) of the Bankruptcy Act gives the Trustee the status of a creditor with a lien obtained by legal or equitable proceedings *as of the date of bankruptcy*. Lewis v. Manufacturer's National Bank of Detroit (CA 6th March 7, 1960), ... F2d ..... In re Herman Billings, (W.D. Mo. 1959), 176 F. Supp. 253; Since the chattel mortgage in question was duly filed in the manner and form required by state law, before the date of the filing of the Bankruptcy petition, Section 70 (c) has no application. In re Gibson (CA 6th 1933), 65 F 2d 921; In re Charles DiPierro (D.C. Maine 1958), 159 F. Supp. 497; In re Herman Billings, supra. Since under Section 70 (c) the Trustee's rights arise *as of the date of bankruptcy* and since the chattel mortgage herein involved was filed prior to such date, Section 70 (c) is not applicable to the facts in the instant case and since it is not applicable, Act 153 of the Michigan Statutes cannot under these facts be in conflict therewith.

The Petitioner contends that a state statute relating to the filing of chattel mortgages, which provides that a chattel mortgage, to be valid against creditors of the mortgagor, inter alia, shall be filed forthwith but that in the event of insolvency proceedings the chattel mortgage shall be valid against creditors of the mortgagor if filed within 14 days from the date of execution thereof, is in conflict with the Bankruptcy Act in that it discriminates against a Trustee.

The Respondent recognizes that the Federal Government has broad powers as regards bankruptcy by reason of Section 8, Article I of the Federal Constitution, but the validity of various types or kinds of transactions entered into by a bankrupt as against a Trustee or Receiver in Bankruptcy is controlled by state law with respect to in-

herent validity or invalidity of the transaction, necessity of recording and formal requirements, relative rights of creditors and the like. Holt v. Crucible Steel Co. (1929), 224 U. S. 262, 32 S. Ct. 414; Remington, Bankruptcy, (5th Ed.), Section 1759, Vol. 4, p. 534; 28 Ref. Jnl. 1954, No. 4, p. 120; 27 Ref. Jnl. 1953, No. 1, p. 29. To put it another way, whether a Trustee is entitled to such a status (of the ideal hypothetical creditor) and the conditions under which he may obtain it are Federal questions covered by the Bankruptcy Act, but the extent of the Trustee's rights, remedies and powers as a lien creditor, are measured by the substantive law of the jurisdiction governing the property in question. In re Wright Industries (E.D. Ohio 1950), 93 F. Supp. 58, 62; accord American Textile Printers Co., Inc. (D.C. N.J. 1957), 152 F. Supp. 901.

While Respondent admits that the Michigan Act in question is unique in that the period for the valid filing of chattel mortgages is different in cases involving insolvency proceedings than in other cases, nevertheless the Courts have consistently held that the question of the validity of filing of chattel mortgages, conditional sales contracts, et cetera, is governed exclusively by state law; is a power left to the States, and the Trustee or Receiver is bound by such state law whether it is favorable or unfavorable to him. Holt v. Crucible Steel Co., supra; In re Imperial Brewery Co. (CA 4th 1942), 127 F 2d 766; In re American Textile Printers Co., Inc., supra; In re Tobias (D.C. Mich. 1957), 150 F. Supp. 288; Dean vs. Fidelity Corporation of Michigan (D.C. Mich. 1949), 82 F. Supp. 710.

Stated in language which cannot be improved upon:

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any

case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of Federal concern. There is no Federal general common law. Congress has no power to declare substantive rules or common law applicable in a State whether they be local in their nature or general, be they commercial or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the Federal Courts." Erie Railroad Co. v. Tompkins (1938), 304 U. S. 64, 58 S. Ct. 817.

"In the absence of fraud or preferential transfer, the validity of a chattel mortgage is to be determined in accordance with the law of the State; and if under the State statute and decisions a mortgage is good as against creditors, it will be considered effective as against the Trustee in bankruptcy of the Mortgagor." Thompson v. Fairbanks (1905), 196 U. S. 516, 25 S. Ct. 306; Holt v. Crucible Steel Co., supra.

The Petitioner makes reference to and apparently rests his case heavily upon the decision of this Court in Moore v. Bay (1931), 284 U. S. 4, 52 S. Ct. 3. Unfortunately for the Petitioner, this case does not say what the Petitioner would like it to say. Moore v. Bay merely held a lien invalid against a creditor under State law is in a bankruptcy proceeding invalid as against all creditors who have allowable claims.

To put it conversely unless the lien was invalid by reason of State law, the lien was good against all creditors of the bankrupt, including the Trustee. This case is just another example of the fact that the Trustee is bound by the laws of the various States on the question of whether a lien is valid or invalid as to such Trustee.

CONCLUSION

Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted.

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